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In The Supreme Court Of The United States

October Term, 1976

No. 76-1717

CHICKASHA COTTON OIL COMPANY, a corporation, ET AL.,
Petitioners,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

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In The Supreme Court Of The United States

October Term, 1976

No. 76-1717

CHICKASHA COTTON OIL COMPANY, a corporation; FARMERS UNION COOPERATIVE GIN AT MARTHA; HARMON COUNTY COOPERATIVE ASSOCIATION; FARMERS UNION COOPERATIVE GIN AT DILL CITY; FARMERS UNION COOPERATIVE GIN AT SENTINEL; PLANTERS COOPERATIVE ASSOCIATION; FARMERS UNION COOPERATIVE GIN AT ELK CITY; FLEET-TERRAL GIN COMPANY; COTTON FARMERS COOPERATIVE GIN; FARMERS COOPERATIVE GIN AND LUMBER; LINCOLN PROPERTY CO.; RODEWAY INNS, INC.; and G.E.M. 15, INC.; J. H. FRATES and JOHANNA I. FRATES, TRUSTEES; THE LEWISTON LTD., a limited partnership, and FRATES PROPERTIES, INC.; CRYSTAL BOWL, INC.; a corporation; HARVARD LANES, INC., a corporation; ROSE BOWL LANES, INC., a corporation; SAHOMA BOWLING LANES, INC., a corporation; SHERIDAN LANES, INC., a corporation; TIFFANY BOWL, INC., a corporation; YALE BOWL, INC., a corporation; and all other members of the Oklahoma Bowling Proprietors Association served by Public Service Company of Oklahoma, a corporation,

Petitioners,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

The Respondent, Public Service Company of Oklahoma ("PSO"), submits its brief in opposition to the Petition of Chickasha Cotton Oil Company, et al., asking that a Writ of Certiorari be issued to review the judgment of the Oklahoma Supreme Court in this case.

I.
OPINIONS BELOW

The opinions below are as set forth in the Petition.

II.
JURISDICTION

The Respondent does not question that this Court has jurisdiction to review this case under 28 U.S.C. §1257(3).

III.
QUESTIONS PRESENTED FOR REVIEW

1. Does the Fourteenth Amendment provide sub-

stantive rights of notice and hearing to public utility customers beyond such rights as are provided by the laws of the State of Oklahoma?

2. Does Article I, Section 10(1) of the United States Constitution prohibit the State of Oklahoma from establishing new public utility rates when the previous established rates have since been embodied in contracts between the utility and its customers?

3. Will a Writ of Certiorari issue when the Petitioners have adequate state remedies?

IV.
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

As a supplement to the statutory material provided by Petitioners, the following statutes and rule involved in this case are set forth verbatim in Appendix F; citations are as follows:

Okla. Stat., Title 17, §124 (Appendix E-1)
Okla. Stat., Title 17, §155 (Appendix E-1)
Corp. Comm. R. of Practice 26(b) (Appendix E-2)

V.
STATEMENT OF THE CASE

Petitioners seek certiorari to the Supreme Court of the State of Oklahoma upon the denial by that court of a writ of prohibition forbidding the collection of rates set by the

Oklahoma Corporation Commission for electric utility services. Specifically, the "Petition for Writ of Prohibition and Injunction" filed November 3, 1975, by which Petitioners initiated an original action in the Oklahoma Supreme Court, sought (1) a "judicial declaration" that Order No. 112286 of the Oklahoma Corporation Commission, establishing rates for electric service to be charged by PSO, is "void and invalid;" (2) an order prohibiting the Oklahoma Corporaion Commission from enforcing its Order; (3) an order prohibiting PSO from collecting the rates established pursuant to Order No. 112286 and requiring PSO to remit all payments for electric utility service made by members of the "Plaintiff class" in excess of rates in effect prior to the issuance of Order No. 112286; and (4) an order requiring PSO to pay costs and attorneys' fees to Petitioners' attorney. The action purported to be brought on behalf of a class consisting of all customers of PSO who fell under "special" tariffs prior to the entry of Order No. 112286 or, alternatively, a class consisting of cotton gins which receive electric service from PSO.

The procedural and factual history of the case, insofar as it relates to the questions presented to this Court, is as follows:

On December 3, 1974, PSO filed an Application (Appendix A) alleging that it was not receiving a fair and adequate rate of return on its assets devoted to public utility service in the State of Oklahoma and praying that the Corporation Commission, after appropriate investigation and hearing, "authorize applicant to adjust its rates to provide an additional $20,150,000 in additional revenue and to spread the increase equally through its rates to permit a reasonable return . . . "

On December 9, 1974, the Corporation Commission issued a Notice and Order Setting Cause for Pre-Hearing and Hearing. On January 16, 1975, the Corporation Commission issued a new Notice and Order Setting Cause for Pre-Hearing and Hearing (the "Notice and Order") (Appendix B), revising the dates set forth in the December 9 Notice and Order and setting the Pre-Hearing for February 19, 1975 and the Hearing for March 19 and 20, 1975. The Notice and Order further directed PSO "to have copies of all basic exhibits and testimony that it will rely on in its Case-in-Chief filed and ready to furnish to interested parties at least 10 days prior [to the February 19 pre-hearing]."

Both the December 9 and January 16 Notice and Order gave the following information concerning the Application:

> "NOTICE IS HEREBY GIVEN that the above-named Applicant has filed an Application alleging that its earnings from electric utility service in Oklahoma are less than reasonable and asking that the Commission adjust the rates and grant such other relief as to enable the Applicant to earn a fair and adequate return on its plant, property and other assets devoted to public utility service in Oklahoma."

Likewise, both Notices provided as follows:

"IT IS FURTHER ORDERED that after hearing, the Commission, *regardless of the relief requested in the Application*, shall issue such Orders and grant such relief as it deems to be proper, necessary, fair, reasonable and equitable in the premises, whether or not specifically prayed for in the Application." (Emphasis added)

The Notice and Order of January 16 was published pursuant to its terms and the requirements of Rule 11(e), Rules of Practice promulgated by the Corporation Commission. Notice by publication was given once a week for two weeks in a newspaper of general circulation in the county seat of every county in which PSO had customers affected by the application (a total of 48 counties). Notice by mailing was given to the Chief Executive Officer of each municipality in which PSO furnishes electrical service (a total of 206 cities and towns.) At about this time also, PSO was advised informally that information concerning restructing PSO's confusing and proliferating tariffs should be included in the evidence to be presented at the prehearing.

On February 19, 1975, according to regular Oklahoma Corporation Commission procedure, a pre-hearing conference was held, at which time all parties were entitled to take the testimony of PSO on pre-trial matters. On March 19, 20 and 26, 1975, evidentiary hearings were held after which the matter was taken under advisement. At the

hearings, in addition to attorneys for PSO, the following parties were represented by counsel: The Corporation Commission, the Oklahoma Chapter of the Sierra Club, Oklahoma Consumer Protection Agency, Inc., National Electrical Contractors Association and Sun Oil Company. Elmer Graham of Temple, Oklahoma appeared pro se. Formal protests were filed by the City of Broken Arrow and the City of Chickasha.

On April 15, 1975, the Commission issued Order No. 112286 (Appendix C). Subsequently, several parties affected by the new rate structure, including several of the Petitioners herein, filed applications for rehearing by the Commission. On May 28, 1975, the Commission issued Order No. 113045, denying the motions for rehearing.

On June 27, 1975, some of the parties who had sought a rehearing filed a Petition in Error with the Oklahoma Supreme Court alleging inadequacy in the Notice given by the Commission. The Court dismissed the appeal on November 10, 1975 as untimely. None of the original petitioners below, the Cotton Gins, filed either an application for rehearing or an appeal from the Corporation Commission's order. The Cotton Gins took no action at all from the date of the Order, April 15, 1975, until filing a Petition for Writ of Prohibition on October 3, 1975 — almost five months after the new rates went into effect.

The Supreme Court of Oklahoma considered the case on briefs of the parties without oral argument and on Octo-

ber 12, 1976, entered an order granting the Writ of Prohibition.

On October 22, 1976 and October 27, 1976, the Oklahoma Corporation Commission and PSO, respectively, petitioned for rehearing. The Court allowed intervention of several amici curiae and heard oral argument by all parties in intervenors on December 7, 1976. On March 8, 1977, the Court, in an extensive opinion (Appendix D), granted the petitions for rehearing and denied the Writ of Prohibition on grounds that (1) the Oklahoma Corporation Commission had complied with its procedural rules, and (2) the notice required by the Oklahoma Corporation Commission rules complied with Oklahoma law and due process. Specifically, the majority opinion dealt with the requirement of due process as follows:

> "We hold that the Corporation Commission was acting in a legislative capacity when it restructured the rates with which we are here concerned. It was not required to give judicial due process notice and hearing to the Petitioners unless specifically required by statute. There is no present statutory provision requiring notice."

VI.

CONCISE ARGUMENT

A. Petitioners Improperly Seek to Have this Court Substitute Its Judgment for that of the Oklahoma Supreme Court.

Although Petitioners have carefully couched their arguments in "due process" terminology, the principal thrust of the Petition is an attempt to have this Court substitute its judgment for that of the Oklahoma Supreme Court as to the requirements of Oklahoma law for setting public utility rates. Such relief simply is not available in this Court, whose jurisdiction to review the judgments of state courts by writ of certiorari extends only to questions of federal law. 28 U.S.C. §1257. The Oklahoma Supreme Court is the final arbiter of Oklahoma law and Petitioners' allegations that it has wrongfully decided questions of Oklahoma law cannot confer jurisdiction on this Court to review those decisions. In *United Gas Public Service Co. v. Texas*, 303 U.S. 123, 139, 82 L.Ed. 702 (1938), a public utility appealed to the Supreme Court from a rate order made by a utility commission and affirmed by the state courts. This Court stated:

> "With respect to the proceedings in the state courts, appellant urges that the case was not tried and determined as required by state law, and we are referred to the state statutes and the decisions of the Texas courts as to the proper procedure in the trial court and on appeal. *It is not our function, in reviewing a judgment of the state court, to decide local questions. We are concerned solely with asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements.*" (Emphasis added)

Accord, Hortonville Joint School Dist. No. 1 v. Hortonville

Educ. Ass'n, ____ U.S. ____, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976); *Groppi v. Wisconsin*, 400 U.S. 505, 507, 27 L.Ed.2d 571 (1971).

Petitioners' allegation that "The Oklahoma Supreme Court in effect held that . . . the Oklahoma Corporation Commission need not comply with its own rules nor require due process notice" of its rate-making hearings (Petition, p. 16) simply misstates the Oklahoma Supreme Court decision, as does the assertion that "this holding is in direct conflict with *Accardi v. Shaughnessy*, 347 U.S. 260, 98 L.Ed. 681 (1954), *Service v. Dulles*, 354 U.S. 363, 1 L.Ed.2d 1403 (1957), and *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759, 22 L.Ed.2d 709 (1969). These erroneous statements attempt to raise an issue not properly reviewable by this Court. As is clear from the majority opinion, the court most assuredly did not hold that the Corporation Commission could defy Oklahoma law, its own rules, or the United States Constitution. To the contrary, it found *compliance* by the Corporation Commission with all relevant provisions of Oklahoma law, including the Commission's own procedural rules.

B. Petitioners Received all the Notice of the Hearing to Which They were Entitled.

The Oklahoma court did hold that Fourteenth Amendment due process imposes no notice or hearing requirement upon the utility rate-making process other than as might be

required by state law. While this ruling is subject to review, Respondent respectfully submits that it is in total accord with prior decisions of this Court and hence not a proper subject for the exercise of this Court's extraordinary discretionary review.

In setting public utility rates for general categories of consumers, the Oklahoma Corporation Commission acts as a legislative or quasi-legislative body, and not as a quasi-judicial body. *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 70 L.Ed. 747 (1926); *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 53 L.Ed. 150 (1908); *Wiley v. Oklahoma Natural Gas Co.*, 429 P.2d 957 (Okl. 1967); *Hine v. Wadlington*, 111 P. 543 (Okl. 1910). Since the Commission is acting as a legislative body in setting rates, the due process clause of the Fourteenth Amendment does not require it to give notice and an opportunity to be heard to all persons potentially affected by a rate change. *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 60 L.Ed. 372 (1915); *Teleco, Inc. v. Southwestern Bell Tel. Co.*, 392 F.Supp. 692 (W.D. Okla. 1974); *Shoenberg Farms, Inc. v. Colorado*, 444 P.2d 277 (Colo. 1968); 2 Am.Jur.2d *Administrative Law* §403.

The practical necessity for this virtually universal rule is obvious. The setting of rates for a public utility affects, directly or indirectly, millions of citizens. The Commission charged with the responsibility, therefore, must weigh broad social questions, both in deciding what rate of return

is fair to the utility and in allocating the benefit and costs of the utility's service among its customers. (The Cotton Gin Petitioners, themselves regulated utilities, obtain approval of their rates by the same procedure.) It is impossible for the Commission to hear each customer's reasons why his share of the cost should be greater or less than that of his neighbor. Rather, as Justice Holmes observed in response to an attack on Colorado's method of raising real property assessments:

> "The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society by their power, immediate or remote, over those who make the rule."

Bi-Metallic Investment Co. v. State Board of Equalization, supra, 239 U.S. at 445, L.Ed. at 375. In Oklahoma, the Corporation Commissioners who set utility rates are elected officials (OKLA. CONST. Art. 9, §15), and, as the Oklahoma Supreme Court has held:

> "The corporation commission represents the consumer and its orders fixing rates are for the benefit of the consumer."

American Indian Oil & Gas Co. v. George F. Collins & Co., 9 P.2d 438, 442 (Okl. 1932). *Accord, Smith v. Illinois Bell Tel Co., supra,* 270 U.S. at 592, 70 L.Ed. at 749.

(". . . the commission represents the public and especially the subscribers, and they are properly bound by the decree.")

Thus, the legislative nature of rate-making makes use of judicial due process standards for notice and hearing inappropriate. Moreover, it is well established that the due process clause of the Fourteenth Amendment requires notice and a hearing prior to governmental action only if the interests abridged are encompassed within the Fourteenth Amendment's protection of liberty and property. *Board of Regents v. Roth,* 48 U.S. 564, 33 L.Ed.2d 548 (1972). It has long been held that a consumer's access to the services of a public utility is not such a property right. *Wright v. Central Kentucky Natural Gas Co.,* 297 U.S. 537, 542, 80 L.Ed. 850 (1936); *Norwegian Nitrogen Prod. Co. v. United States,* 288 U.S. 294, 318, 77 L.Ed. 796 (1933); *Teleco, Inc. v. Southwestern Bell Tel Co., supra; United States Light & Heat Corp v. Niagara Falls Gas & Electric Light Co.,* 47 F.2d 567 (2nd Cir. 1931); *Sellers v. Iowa Power & Light Co.,* 372 F.Supp. 1169 (S.D. Iowa 1974).

C. Cases Cited by Petitioners are Inapplicable to the Issues Presented.

The cases cited by Petitioners are not in conflict with the principles discussed above, nor do they offer any independent support for Petitioners' thesis. Neither *Morgan v. United States,* 298 U.S. 468, 80 L.Ed. 1288 (1936), nor

Londoner v. Denver, 210 U.S. 373, 52 L.Ed. 1103 (1908), held that due process requires any form of notice or hearing in rate-making proceedings. *Morgan* at most stands only for the principle that the officer exercising the statutory authority to fix rates must also accept the statutory obligation of hearing the evidence upon which the decision is to be made. It applied to specific legislation and, like many of the cases cited by Petitioners, involved an appeal by the regulated industry itself, which is acknowledged to have a property interest in its own rates. *Londoner*, on the other hand, does indeed prescribe judicial notice and hearing under very narrow circumstances, but is more applicable here by virtue of its clear holding that the plaintiffs were entitled to no voice in the city's decision-making process, nor even any notice that a decision was being contemplated, until they were singled out for treatment *different* from that of the populace as a whole. In *Bi-Metallic*, this Court distinguished *Londoner* as dealing with an unusual situation which had the characteristics of a judicial rather than a legislative proceeding. *Bi-Metallic Investment Co. v. State Board of Equalization, supra*, 239 U.S. at 445-446. *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U.S. 63, 79 L.Ed. 761 (1935), like *Morgan*, dealt not with notice of rate proceedings to *customers* of a utility, but to the *utility* itself, and hence lends no support to Petitioners' untenable claim that every utility user is entitled to the same notice and opportunity to be heard as is the utility whose rates are being set.

Lastly, Petitioners cite several cases in which "[T]he specific issues raised herein have been decided favorably to Petitioners' claim . . ." However, the cases cited by Petitioners do not interpret the constitutional standard of due process, but in most cases the Administrative Procedure Act, which sets out specific notice and hearing provisions for federal administrative agencies.* As discussed earlier, all state provisions concerning notice and hearing have been complied with by the Oklahoma Corporation Commission. The Administrative Procedure Act and the cases interpreting it are therefore not relevant.

D. The "Contracts Clause" of Article I, Section 10 of the Constitution Does Not Prohibit New Rate Making by the Corporation Commission.

Petitioners apparently rest their claim that the action of the Corporation Commission abrogated contract rights

*See, *Texaco, Inc. v. Federal Power Commission*, 412 F.2d 740 (3d Cir. 1969); *Wagner Electric Corporation v. Volpe*, 466 F.2d 1013 (3d Cir. 1972); *Pharmaceutical Manufacturers Assoc. v. Finch*, 307 F.Supp. 858 (Del. 1970); *Chicago, Burlington & Quincy Ry. Co. v. United States*, 242 F.Supp. 414 (N.D. Ill. 1965). In *Virgin Island Hotel Ass'n v. Virgin Island W & P Auth.*, 465 F.2d 1272 (3d Cir. 1972), the court found that the notice given failed to comply with a Virgin Islands statute, not constitutional due process. In *Pacific Molasses Company v. Federal Trade Commission*, 356 F.2d 386 (5th Cir. 1966) the court held that the commission had to comply with its own previously set rules in an enforcement proceeding against one defendant. In *Re Public Service Co. of Indiana, Inc.*, 21 PUR3d 310 (1957) the Indiana Utility Commission itself decided to give new notice and hold a further hearing before establishing new rates; no judicial review was involved in the case at all.

in violation of Art. I, §10(1) of the Constitution on *Arkansas Natural Gas Company v. Arkansas Railroad Commission*, 261 U.S. 379, 67 L.Ed. 705 (1923). That case, however, offers absolutely no support for Petitioners' contention that they were entitled to separate hearings on their rate solely because the rates previously set by the Corporation Commission had been set out in contracts between Petitioners and PSO. While *Arkansas Natural Gas* does state that such contracts cannot be set aside by the state solely because they are burdensome to one of the parties, it affirms this Court's prior holdings that "a state may exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts," so long as the power is exerted for the public welfare. See, *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 81 L.Ed. 540 (1937); *Union Dry Goods Co. v. Georgia Pub. Serv. Corp.*, 248 U.S. 372, 63 L.Ed. 309 (1919). Petitioners do not assert that the Corporation Commission's finding of public need for new rates was incorrect, nor can they claim it was unauthorized, since every notice made it perfectly clear that PSO's rates would be raised. Their argument that the change abrogated their contract in violation of Article I, §10 of the Constitution must be regarded as makeweight.

E. The Petitioners Have Adequate Remedies Available Under State Law.

The Petitioners have more than adequate remedies

under the law of Oklahoma which they have totally failed to pursue. Under Corporation Commission Rule 26(b) (Appendix E-2), the Petitioners could have filed an application for a new hearing any time ten days subsequent to the entry of Order No. 112286. The application allowed by the rule can seek to alter, amend or vacate the objectionable order. At this new hearing, Petitioners could show the Commission the particular circumstances which make the new rates unfair *as applied to them*, a particularized inquiry which would have been wholly inappropriate for the Commission to undertake during the hearings dealing with PSO's rates generally. Thus, since April 25, 1975, and to the present, Petitioners have had available to them the right to the very hearing they claim to have been denied, and a right to appeal to the Oklahoma Supreme Court should the Corporation Commission fail to grant the relief requested.

Instead of availing themselves of this unambiguous right under Oklahoma law, Petitioners waited almost six months to file for a Writ of Prohibition, and then chose to wage a broad attack on the entire rate-making process rather than simply to seek relief from the new rates which they apparently feel are unduly burdensome when applied to their particular business enterprises. The route pursued by Petitioners has been inappropriate, given their actual needs, and has caused over two years delay in unnecessary court proceedings while the relief they actually sought was

readily obtainable, if shown to be appropriate, from the Corporation Commission. Moreover, even if Petitioners obtained the relief actually available from this litigation, it would be nothing more than a hearing before the Corporation Commission, which is the sole body constitutionally capable of determining the appropriate rates for electric utility service. Thus, a grant of the Writ of Certiorari, and even an ultimate decision in their favor, would give Petitioners neither more nor less than what has been available to them for over two years. It is clear, therefore, that the Petition offers no ground for the exercise of discretionary jurisdiction by this Court.

VII.
CONCLUSION

Petitioners attempt to bootstrap themselves into recognized constitutionally-protected positions by starting from a premise for which they can offer no authority. No case cited by Petitioners affords the slightest support to the proposition that the Federal Constitution affords them some right to notice and hearing independent of and greater than the provisions of Oklahoma law, which have been complied with. To the contrary, the cases uniformly hold that any right a utility customer may have to notice of rate hearings is wholly a matter of state law.

The decision of the Oklahoma Supreme Court is supported not only by the prior decisions of this Court and others, but sound public policy as well. Like every other state, Oklahoma has created a carefully thought out constitutional and statutory scheme for the supervision of public utility rates and services. The State has vested in the Commission, which is directly responsible to the electorate, the power to establish public policy with respect to the development of alternative energy sources, the allocation of utility services and the manner in which the cost of those services will be spread throughout the consuming public. Petitioners assert, in effect, that the Commission should no longer focus its inquiry in general rate-making hearings on the broad questions of what will most benefit the State as a whole but must instead turn their attention

to the claims of hundreds or thousands of individual customers that their particular use characteristics or hardships justify special treatment.

For all the reasons stated, Respondent respectfully requests that a Writ of Certiorari to the Supreme Court of the State of Oklahoma be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. DOBIE LANGENKAMP, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, Public Service Company of Oklahoma, hereby certifies that on the 2nd day of July, 1977, pursuant to the Rules of the Supreme Court, I served three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Oklahoma Supreme Court on the following parties:

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APPENDICES

APPENDIX A

BEFORE THE CORPORATION COMMISSION OF
THE STATE OF OKLAHOMA

FILED
DEC - 3 1974
SECRETARY
CORPORATION COMMISSION
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF OKLAHOMA, A DOMESTIC CORPORATION, FOR AN ADJUSTMENT IN ITS RATES AND CHARGES FOR ELECTRIC UTILITY SERVICE IN THE STATE OF OKLAHOMA.	)	CAUSE NO. 25346

APPLICATION

Comes now Public Service Company of Oklahoma, a domestic corporation, hereinafter referred to as Applicant, and for its cause of action, alleges and states:

I.

1. That Applicant is a corporation created and organized by and under the laws of the State of Oklahoma duly authorized to conduct business therein, with its principal office at First National Tower, P.O. Box 201, Tulsa, Oklahoma 74102. That it is a public utility with plant, property and other assets dedicated to and for the generation, transmission, distribution and sale of electric energy within and throughout a large number of counties within Oklahoma.

2. That its present rates and charges were approved by the Corporation Commission of the State of Oklahoma in its Order No. 70384, entered on the 19th day of November, 1968.

II.

1. That since the date of said Order, Applicant has been faced with increases in the costs of fuel, labor, maintenance, supplies and other expenses of doing business as well as increases in taxes. Additionally, Applicant has been paying higher interest rates for borrowed capital necessary for the construction and maintenance of its facilities. That all increases have been beyond the control of Applicant and have resulted in Applicant earning less than a reasonable return on the fair value of its plant, property and other assets devoted to public utility services in the State of Oklahoma.

2. Applicant has made a concentrated effort, by economizing in operation to combat and offset cost increases. However, the increased costs of goods, services and money have far exceeded . . .

3. That due to the foregoing, the Applicant is not earning a fair and adequate rate of return on the fair value of its plant, property and other assets devoted to public utility service in the State of Okahoma.

That for the year ending December 31, 1974, Applicant will earn a pro forma rate of return of less than 5¼% on its fair value public utility rate base of approximately $606,000,000. Without the rate adjustment herein requested, the rate of return will decrease to less than 4½% in 1975.

4. That the cost for fuel that is necessary to generate electricity to supply Applicant's customers is increasing, and the fuel adjustment clause does not recover all of the increased cost.

5. That an additional $20,150,000 should be provided by an adjustment to Applicant's rates under the jurisdiction of this Commission which amount is an increase of 12.5%. $3,100,000 in additional revenue should be provided through a modification of the fuel cost adjustment clause for sales

to the Grand River Dam Authority so that this fuel cost adjustment clause will be as nearly as possible on the same basis as applied to other customers, which modification has been requested by a filing with the Federal Power Commission. The total of $23,250,000 in additional annual revenue is needed to provide Applicant a reasonable rate of return on the fair value of its plant, property and other assets and to allow a reasonable return on its equity capital.

III.

Jurisdiction of the Commission in this proceeding is based on its authority to fix rates and charges found in 17 O.S. 1971, Section 151, 152, and the general regulatory power in Article IX, Section 18, of the Constitution of the State of Oklahoma and related sections, which have been extended to electric utilities.

IV.

WHEREFORE, Applicant prays:

That the Corporation Commission of the State of Oklahoma, after giving notice of hearing and after appropriate investigation and hearing as prescribed by its rules, authorize Applicant to adjust its rates to provide an additional $20,150,000 in annual revenue and to spread the increase equally throughout its rates to permit a reasonable return on its equity capital and permit Applicant to earn a fair and adequate rate of return on the fair value of its plant, property and other assets devoted to public utility service in the State of Oklahoma.

Respectfully submitted,

PUBLIC SERVICE COMPANY OF OKLAHOMA

s/ By Robert L. Lawrence
Robert L. Lawrence

s/ Everett L. Cunningham
Its attorneys

First National Tower
P. O. Box 201
Tulsa, OK 74102
Phone: 918/583-3611

APPENDIX B

BEFORE THE CORPORATION COMMISSION OF
THE STATE OF OKLAHOMA

FILED
JAN 16 1975
SECRETARY
CORPORATION COMMISSION
OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF OKLAHOMA, A DOMESTIC CORPORATION, FOR AN ADJUSTMENT OF ITS RATES AND CHARGES FOR ELECTRIC UTILITY SERVICE IN THE STATE OF OKLAHOMA.	)	CAUSE NO. 25346

NOTICE AND ORDER SETTING CAUSE
FOR PRE-HEARING AND HEARING

NOTICE IS HEREBY GIVEN that the above-named Applicant has filed an Application alleging that its earnings from electric utility service in Oklahoma are less than reasonable and asking that the Commission adjust the rates and grant such other relief as to enable the Applicant to earn a fair and adequate rate of return on its plant, property, and other assets devoted to public utility service in Oklahoma.

NOTICE IS FURTHER GIVEN that a Notice and Order Setting this Cause was previously issued wherein the pre-trial hearing was scheduled for March 25, 1975, and hearing on the merits April 24, 1975. However, these previously scheduled hearing dates have been cancelled and changed to dates hereinafter stated.

IT IS THEREFORE ORDERED that this Cause be set for pre-hearing conference in the Commission's Courtroom,

Third Floor, Jim Thorpe Building, Oklahoma City, Oklahoma, at 10:00 a.m., on the *19th* day of *February, 1975*. Applicant is directed to have copies of all basic exhibits and testimony that it will rely on in its Case-in-Chief filed and ready to furnish to interested parties at least 10 days prior to this hearing.

NOTICE IS FURTHER GIVEN that at the pre-hearing conference the Commission will consider and rule on motions, requests for information, and determine other procedural matters.

IT IS FURTHER ORDERED that this Cause be set for hearing on the merits before the Commission en banc in its Courtroom, Third Floor, Jim Thorpe Building, Oklahoma City, Oklahoma, at *10:00 a.m.*, on the *19th and 20th days of March, 1975*.

IT IS FURTHER ORDERED that Applicant shall cause the above notice to be published once a week for two consecutive weeks in a newspaper of general circulation in the county seat of all counties in which the Applicant has customers that will be affected by the Application and that notice by mail be given to the Chief Executive Officer of each municipality in which the Applicant furnishes electric retail service, and that such notice, both by mail and by publication, shall be made at Applicant's expense, submitting proof of publication and affidavits of mailing for the record herein.

IT IS FURTHER ORDERED that after hearing, the Commission, regardless of the relief requested in the Application, shall issue such Orders and grant such relief as it deems to be proper, necessary, fair, reasonable and equitable in the premises, whether or not specifically prayed for in the Application.

All inquiries for information concerning this Application should be directed to Mr. Robert L. Lawrence, General

Counsel, Public Service Company of Oklahoma, P. O. Box 201, Tulsa, Oklahoma 74102.

DONE AND PERFORMED this 16th day of January, 1975.

CORPORATION COMMISSION OF OKLAHOMA

s/ Rex Privett
REX PRIVETT, Chairman

s/ Ray C. Jones
RAY C. JONES, Vice Chairman

s/ Hamp Baker
HAMP BAKER, Commissioner

ATTEST:

s/ Ed Overholser
ED OVERHOLSER, Secretary

APPENDIX C

BEFORE THE CORPORATION COMMISSION OF
THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF OKLAHOMA, A DOMESTIC CORPORATION, FOR AN ADJUSTMENT IN ITS RATES AND CHARGES FOR ELECTRIC SERVICE IN THE STATE OF OKLAHOMA	)	CAUSE NO. 25346
	)	ORDER NO. 112286

BY THE COMMISSION:

Robert Lawrence and Everett Cunningham, for the Applicant

Andrew Dalton for the Sierra Club of Oklahoma

Calvin Hendrickson, for N.E.C.A.

Jack A. Swidensky, Lee W. Cook, and David Wick, Jr., for the Commission

PRE-HEARING CONFERENCE: February 19, 1975.

HEARINGS: March 19, 20 and 26, 1975.

FINDINGS

Applicant, Public Service Company of Oklahoma, is a domestic corporation, a public utility with plant, property and other assets dedicated to, and used for the generation, transmission, distribution and sale of electric energy within and throughout a number of counties in Oklahoma, which currently serves 373,039 customers. It is one of four operating electric companies comprising Central and Southwest Corp., an electric holding company doing business in Oklahoma, Arkansas, Texas and northwestern Louisiana. Applicant accounts for approximately 31% of the consolidated holding company's revenue. Applicant's present rates and

charges were approved by this Commission in its Order No. 70384, entered November 19, 1968. In its Application, the Company proposed and sought to re-structure its tariffs and adjust its rates to provide an additional $23,500,000 in annual revenue using a test year ending December 31, 1974. However, $3,100,000 involves non-jurisdictional sales under the Federal Power Commission's jurisdiction, involving the Markham Ferry co-ordinating agreement (G.R.D.A.), dated August 5, 1957, which increase the Applicant requested be made effective January 1, 1975. Thus, the jurisdictional request proposed herein is for $20,150,000.

This proceeding was duly set for prehearing conference and public hearing, requiring that notice be given by mailing a copy of the notice to the Chief Executive Officer in each city or town in which the Applicant furnishes electric service and by publishing once a week for two consecutive weeks in a newspaper of general circulation in the county seat city or town of each county in which the Applicant has customers that will be affected by the Application.

During this hearing, a total of 100 exhibits were presented and received from the Applicant, protestants, intervenors and staff of this Commission. The Applicant introduced testimony showing revenue and expenses for the test year herein ending December 31, 1974, with normalization. Such normalization was made by making adjustments both in revenue and expenses to reflect weather conditions, non-firm off-system sales, etc., which reduced annual revenue at December 31, 1974, by $5,045,000. Normalized expense adjustments by the Applicant amounting to increased expense of $2,709,000, plus adjusted income taxes resulted in $29,089,000 in utility operating income for a 6.10% return on original cost rate base. Adjustments by the Commission staff to the Applicant's exhibits increased revenues and decreased expenses which resulted in utility operating income of $30,435,000 for a return on the Commission staff adjusted original cost rate base of 7.32%. Total weighted

cost of capital was shown to be 8.5%, including a proposed 13% return on common equity.

The Applicant presented exhibits showing original cost and fair value rate base and exhibits showing rate of return on fair value and on original cost rate base. However, the Company during the hearing proposed a rate of return on original book cost less accrued depreciation and did not ask or propose trended costs, replacement costs, or fair value. The testimony of the Company indicated that it sought rate relief based upon a return of 8.5% on its original cost rate base.

RATE BASE

In this case, the Applicant presented testimony as to plant, revenue and expenses for a test period ending December 31, 1974. According to the Applicant's testimony, its plant and property devoted to utility service in the State of Oklahoma on a normalized or pro forma original cost basis, amounted to $447,238,000. However, this includes net plant in service, construction work in progress, plus an allowance for material and supplies and cash working capital. The Commission staff used an end of period rate base. On an original cost basis, the staff found the rate base to be $415,661,000 at the end of the test period. The main difference between the two original cost rate bases being the treatment accorded construction work in progress, cash working capital, material and supplies and accumulated deferred Federal Income Tax. The staff audit used average, beginning and ending year for materials and supplies and, we find and make adjustments upward to allow year end figures.

Applicant introduced evidence of growing acceptance for inclusion of "varying amounts" of construction work in progress with benefits both to the consumer and the Applicant. The Applicant and the Commission staff witness agreed that nuclear fuel in process of refinement should be

treated as a prepayment for material and supplies under working capital, and not as a part of work in progress. However, the Commission finds and determines that any expense or investment for nuclear energy facility should be excluded at this time, in view of the fact that no approval or authorization has been determined by the Nuclear Regulatory Commission. Work in progress is a subject matter which should be currently considered by the Commission, but we cannot accept the Applicant's full proposal herein.

Construction work in progress which is reasonable in amount and contemplated to be in service within a reasonable time after the end of the test year may properly be included in a utility's rate base on which it is entitled to earn a rate of return. There should be no allowance for funds used during construction accrued on Construction Work in Progress to the extent that Construction Work in Progress is included in rate base subject to the jurisdiction of the Commission upon which revenues are being collected. If such charges do not cease, the utility would obtain a double recovery on such charges, which can not and should not be approved.

Because a public utility must engineer and construct plant in advance of actual customer needs and cannot wait until those needs actually occur, the utility cannot be denied a reasonable return thereon unless it can be shown that the investment was improvident or imprudent. Neither the Commission nor the Applicant can operate in an abstract vacuum; and reasonable available cash flow must be provided. These items represent funds supplied by investors and are funds on which investors are entitled to an opportunity to earn a rate of return found fair and reasonable. The Commission feels that this is in the public interest and therefore finds that construction projects in progress which will be on line or in use no later than December 31, 1975, should be and are thus allowed in the current rate base. Consistent with the three year revenue increase treatment

given, the Commission allows rate base consideration of work in progress as found herein, to be $17,500,000 in 1975, and an additional $5,000,000 in 1976, an additional $5,000,000 in 1977, for a total of $27,500,000 thereafter.

Therefore, the Commission directs that the allowance for funds used on work in progress, in excess of amounts allowed herein be capitalized, for projects which exceed $5,000 and require more than thirty days for completion. The rate use for such computations shall be established at the beginning of each year and shall not exceed the Applicant's current cost of capital at that time. This computation shall be made monthly, and the amount so determined recorded on the Applicant's books by an increase to the work in progress account and an increase to other non-operating income. The effect of this procedure is to reflect a non-cash entry resulting in non-cash earnings on the current income statement and the deferral of realization of cash until the time the work in progress, including the allowance for funds used during construction, is placed in service and depreciation charges against income commerce.

Therefore, by the adjustments made herein, we find the adjusted rate base for 1975 to be $438,603,000; for 1976: $443,603,000; and for 1977: $448,603,000.

OPERATING RESULTS DURING THE TEST PERIOD, AS NORMALIZED

The Applicant introduced testimony showing revenue and expenses for the test period ending December 31, 1974, with normalization. These normalizations consist of making adjustments, both as to revenue and expenses to reflect what the revenue and expenses would have been had the conditions as of December 31, 1974 levels been prevalent during the entire twelve months, plus certain adjustments that have occurred or reasonably can be anticipated to occur outside the test period. These normalizing adjustments included an adjustment for abnormal weather con-

ditions and non-firm off-system sales which reduced the annual revenue at December 31, 1974, by $5,045,000. Normalized expense adjustments by the Applicant amounting to increased expenses of $2,709,000 plus adjusted income taxes resulted in $29,089,000 in utility operating income, for a 6.10% return on original cost rate base. Staff adjustments to the Applicant's exhibits increased revenues and decreased expenses which resulted in utility operating income of $30,435,000 for a return on the staff adjusted original cost rate base of 7.32%.

The Applicant decreased revenue by $9,559,000 for abnormal non-firm off-system sales and decreased expenses by $1,709,000 for fuel to generate power for the non-firm off-system sales. The Applicant cannot conclusively prove that the power will not be sold, nor can the staff prove that it will be sold. However, the plant capacity is there, the need for KHW's is here, the company need only try to sell it. The question is, should the ratepayers or the stockholders have this burden and responsibility? The Commission cannot totally allow the adjustment as proposed. The staff adjusted fuel cost (and thus, working capital allowance) and labor cost, general and miscellaneous taxes and these adjustments are approved. The Applicant proposed in its municipal street lighting rate the 40% discount as now existing in current contracts. The Commission does not disapprove this, but for rate making purposes, this subject, in the amount of $113,800 should be treated as earned revenue so as to reduce revenue deficiency accordingly.

The Commission finds that the Applicant has exercised prudent operation by enacting cost reduction programs that have significantly reduced operating expenses. Promotional practices have been curtailed and advertising has been limited. Contributions are currently taken "below the line." Advertising expenses in the amount of $363,411 for consumer education and conservation of energy, as allowed by the Supreme Court, are found to be fair and reasonable and are allowed as a proper expense in this Cause.

The Applicant's use and treatment of their employee discount for residential service is approved. This record reflects a 5-year trend increase for uncollected bills and for the test period, $390,210. However, the Company wrote off $535,290 due to having to add to their reserve. This amount is allowed as expense but the company is directed to review and police this area due to our general rules allowing them to require a two months deposit, a 1½% late payment charge and a reconnection charge.

Consistent with our finding herein and the company's activity in the area of promotional practices, the company should advise this Commission's Public Utility Engineer, consistent with our Order No. 87994 and delete those practices or allowances not presently in effect. Likewise, this record reflects that the Applicant has one town served under a 3% franchise tax due to a previous purchase. This franchise payment should be processed, charged and paid consistent with Rule #54 of our Order No. 101932 and the excess over 2% should be separately stated on the face of the bill and charged consumers pro rata within the municipality.

The Commission finds the Applicant's proposed 13% return on common equity at December 31, 1974 levels is fair and reasonable. Consistent with our adjustments and findings made herein, we determine a gross revenue deficiency for 1975 of $13,927,000.00; for 1976, an additional $863,000, and for 1977, an additional $863,000.

RATES AND RE-STRUCTURING

This record reveals that Applicant currently has approximately 180 separate rates and riders. This is causing confusion, unnecessary expense, is possibly unfair discrimination for the same or similar service, and thus the proposal to re-structure into nine rates is absolutely necessary and clearly in the public interest. However, this re-structuring and the harsh immediate economic impact on customers has

bothered and concerned the Commission during these entire proceedings.

First, the Commission finds that Applicant's proposals in their submitted tariffs, concerning their fuel cost and heat rate factors are not in compliance with current general orders and shall not be accepted for filing and approval by the Commission's Public Utility Engineer until they are consistent with Rule No. 55, Order No. 101932 and so approved by that department. Under Applicant's proposal, fuel cost based at 50 cents per MCF, at a heat rate factor of their proposed 11,500 KWH would cause the cost of fuel to be 5.75 mills per KWH; which, in fact, is higher than Applicant's cost of fuel under the accepted formula in Order No. 101932. Also, the tax adjustment clause in each filed tariff shall be amended to delete the language, "or contributions or payments in lieu thereof, or other exactions", and shall add the following language at the end of that sentence: "when voted by the people at a regularly called franchise election."

The Sierra Club of Oklahoma presented the testimony of Dr. Eugene P. Coyle, the thrust of which covered the efficiency-incentive function of rate design, incremental cost pricing, tail block rates reflecting incremental cost and not priced at average or fully-distributed costs, raising the lower block rates and decreasing the first few steps, restricting rates below cost to industry to attract more industry and then making up these low rates to industry by charging the residential customers enough to subsidize the industrial user, contesting the traditional declining price with increasing use and the rate design and schedules as proposed remaining promotional, with both capacity and energy charges declining as the customer uses more power or energy.

Curiously, this record reflects that during the test period, residential customers paid 35.8% of the company's revenue, commercial paid 22.8%, industrial 14.9%, and

public street lighting, public authorities and sales for re-sale accounted for the balance of revenue. For MWH's sold, residential customers accounted for 21.8%, commercial for 16.7%, industrial for 19.8% and public street lighting, public authorities and sales for re-sale accounted for the balance. Considering the total number of customers: residential accounted for 88.3%, commercial for 10.4%, industrial for 1% and public street and highway lighting and sales to public authorities (not for re-sale) accounted for the balance. All of these factors as found and reviewed herein must be considered. However, the "past" fundamental truths such as "growth is always good" and "electricity is always cheap" have been shattered.

The impact of the proposed re-structured rates varies substantially among individual customers because of the vast difference in prices charged for similar services on the numerous pre-existing rates. The low impact rate proposal considered by the Applicant at the request of the Commission during the hearing represents substantial mitigation of the aforementioned impact on some individual customers. It appears that such mitigation is in the public interest. The plan for a gradual implementation of the proposed rate structure, as requested by this Commission, represents an appropriate vehicle for equalization of charges for similar service without requiring immediate undue economic impact. While such a plan may constitute an administrative inconvenience to the Applicant, it nevertheless will provide for achievement of equity among customers in an orderly fashion. Such a transition from traditional promotional pricing practices to a posture of similar charges for similar service is in the public interest.

The Applicant is thus directed to re-structure its tariffs under the "low impact proposal" as requested by the Commission on this record, such rates being closed to new customers and the same shall be cancelled and terminated at the end of the billing month of May, 1976 and 1977, as

provided herein. Tariffs shall be re-structured, considering the additional revenues granted herein and shall be spread over the 3-year period as herein provided. These tariffs shall be implemented and billed after being filed with and approved by the public utility engineer of this Commission, consistent with our findings and order herein.

From this record the Commission concludes that an appropriate rate design should reflect and consider long-run costs to each classification of customer, conserve energy resources, promote economic efficiencies, ease of administration and easier understanding by customers. Demands for increased capacity of generation and transmission facilities and the demands for large amounts of fuel generated by heavy use customers are the principal factors behind the Applicant's needs for increased revenue. This can be accomplished by placing a heavier burden on larger residential users than that placed on the small and medium use residential customers, and also a heavier burden on large commercial and industrial users. This is not accomplished in this Order due to the immediate impact, but we have taken a step in the right direction and will be closer to the objective in 1977.

ORDER

IT IS THEREFORE ORDERED AND DIRECTED:

1. Applicant shall file tariffs designed to recover the revenue deficiency in compliance with the findings made herein.

2. Upon the filing and approval of such tariffs, all current tariffs, rates, riders and special contracts of the Applicant shall be vacated and cancelled.

3. The Applicant is directed to implement the rates herein authorized to be effective on the first billing, thirty (30) days from the date of this Order. It is recognized that all customers are not billed on the same date because of

being billed on different monthly billing cylcles, therefore the Applicant shall not prorate billing between the former and new rate schedules.

4. In order to monitor and supervise the increases granted herein, the Applicant is directed to file monthly operating statements or reports with the Commission for a twelve (12) month period.

DONE AND PERFORMED this 15th day of April, 1975.

CORPORATION COMMISSION OF OKLAHOMA

s/ Rex Privett
REX PRIVETT, Chairman

RAY C. JONES, Vice Chairman

s/ Hamp Baker
HAMP BAKER, Commissioner

ATTEST:

s/ Ed Overholser
ED OVERHOLSER, Secretary

APPENDIX D

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAR 8 1977
Ross N. Lillard, Jr.
CLERK

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

CHICKASHA COTTON OIL COMPANY, a corporation, FARMERS UNION CO-OPERATIVE GIN AT MARTHA, HARMON COUNTY COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT DILL CITY, FARMERS UNION COOPERATIVE GIN AT SENTINEL, PLANTERS COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT ELK CITY, FLEET-TERRAL GIN COMPANY, COTTON FARMERS COOPERATIVE GIN, FARMERS COOPERATIVE GIN AND LUMBER,

Petitioners,

vs.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,

Respondents,

vs.

No. 48,956

LINCOLN PROPERTY CO., RODEWAY INNS, INC. and G.E.M. 15, INC., J. H. FRATES and JOHANNA I. FRATES, TRUSTEES, THE LEWISTON LTD., a

limited partnership, and FRATES PROPERTIES, INC., CRYSTAL BOWL, INC., a corporation, HARVARD LANES, INC., a corporation, ROSE BOWL LANES, INC., a corporation, SAHOMA BOWLING LANES, INC., a corporation, SHERIDAN LANES, INC., a corporation, TIFFANY BOWL, INC., a corporation, and all other members of the Oklahoma Bowling Proprietors Association served by Public Service Company of Oklahoma, a corporation,

Intervenors.

Petition asking the Court to Assume Jurisdiction and to prohibit the Corporation Commission from enforcing new rates promulgated in Corporation Commission Order No. 112286 in Corporation Commission Cause No. 25346.

JURISDICTION ASSUMED;
WRIT OF PROHIBITION DENIED.

Terry Shipley
Noble, Oklahoma — For Petitioners,

Jack Swidensky
General Counsel
Oklahoma Corporation Commission
Oklahoma City, Oklahoma
and
Robert L. Lawrence
Tulsa, Oklahoma — For Respondents,

Harry M. Crowe, Jr.
Crowe & Thieman
Tulsa, Oklahoma
Charles E. Norman
Rizley, Prichard, Ford, Norman & Reed
Tulsa, Oklahoma

E. H. Gubser
Tulsa, Oklahoma

Larry B. Ferguson
and
Kenneth C. Ellison
Tulsa, Oklahoma — For Intervenors.

BARNES, J.:

This is a class action brought on behalf of Petitioners and all classes of persons receiving electrical service from The Public Service Company of Oklahoma (PSC) under special tariffs which were in effect prior to April 15, 1975, asking that PSC be prohibited from charging and that the Corporation Commission be prohibited from enforcing the new rates promulgated in Corporation Commission Order No. 112286, promulgated April 15, 1975, in Corporation Commission Cause No. 25346.

We are here confronted with the question of what notice, if any, must be given to customers of a public utility before its rates can be changed by the Corporation Commission. The Oklahoma Constitution, which gives ratemaking authority to the Corporation Commission, provides for notice to the utilities (Article 9, § 18), but it does not provide for notice to a patron of the utility. This was recognized and explained in the case of *American Indian Oil & Gas Co.* v. *Geo. F. Collins & Co.*, 9 P.2d 438 (Okl. 1932), where this Court stated:

> " * * * There is no merit in that contention. Consumers are not necessary parties before the corporation commission in a rate hearing and they are not necessary parties in the federal court in an action to enjoin the corporation commission from enforcing a rate fixed by it. Neither the Constitution of the State of Oklahoma nor the legislative enactments require notice to be given a consumer. *The corporation commission represents the consumer and its orders fixing rates are for*

the benefit of the consumer. In Smith v. Illinois Bell Telephone Co., 270 U.S. 587, 46 S.Ct. 408, 410, 70 L.Ed. 747, that court held: ' * * * the commission represents the public and especially the subscribers, and they are properly bound by the decree.' " (Emphasis added)

Petitioners do not question the Corporation Commission's authority to issue such an order, but allege that the notice given them was inadequate to afford them judicial due process. They contend that the due process clause of the Fourteenth Amendment to the United States Constitution requires that notice and hearing be afforded them, and that in the absence of such notice the Corporation Commission's order is void.

This Court has repeatedly held that the power to fix rates in Oklahoma is a legislative function. In *Wiley* v. *Oklahoma Natural Gas Company,* 429 P.2d 957 (Okl. 1967), it was asserted that certain rate increases were void because the Commission was influenced by contributions and favors received from a lobbyist of the gas company. We said:

> "It is universally recognized that the fixing of rate schedules for public utilities is a legislative process, and that a public service regulatory body acts in a legislative capacity in approving rate schedules."

And further:

> "It is argued that this Court may vacate the Commission's rate orders established in 1957 and 1963 and order refunds without fixing rates for Oklahoma Natural Gas Company. In Consumers' Gas Co. v. Corporation Commission, 95 Okl. 57, 219 P. 126, this Court held that a natural gas utility is entitled to earn a reasonable return on its investment and a reasonable amount for depreciation and amortization. To hold otherwise would authorize the taking of private property without just compensation, contrary to constitutional provisions.

> How it is possible for this court to strike down the 1957 and 1963 rate orders and thus re-establish rate structures existing prior to 1957 without taking into consideration the financial requirements of the Company during a ten year period of constantly changing state and national economy without fixing rates has not been explained.
>
> "It is is patent that we could not determine the amount of the alleged 'overpayments' and order refunds without either legislating new rate schedules to replace the allegedly void ones, or legislatively placing in effect anew the rate schedules adopted by the Commission prior to 1957."

In *Southern Oil Corporation* v. *Yale Natural Gas Co.,* 214 P. 131 (Okl. 1923), the contention was made that the plaintiff should have received notice of the Corporation Commission's hearing which resulted in its contractual rate for the purchase of natural gas being abrogated. There we held:

> "The contention of plaintiff that it was entitled to notice of the proceedings in which the Corporation Commission established the rate for gas to be charged by the defendant at 15 cents per 1,000 cubic feet, thereby terminating its contractual rights, is likewise without merit. This rate was fixed upon the application of the defendant, and no notice to its consumers or patrons was required. Section 18, art. 9, of the Constitution, provides for notice of at least 10 days to be given by the commission to the company or companies to be affected by any rate charge, classification, order, rule, regulation, or requirement. This clearly means that notice shall be given to the public service corporation who is to be affected by said rate, and does not mean that notice must be given to its patrons. Rate making being a legislative power, notice to parties affected by an order of the Corporation Commission, fixing gas

rates upon the application of the public service corporation, need not be given, unless specifically required by statute. City of Bartlesville v. Corporation Commission, 82 Okl. 160, 199 Pac. 396."

We hold that the Corporation Commission was acting in a legislative capacity when it restructured the rates with which we are here concerned and was not required to give judicial due process notice and hearing to the Petitioners, unless specifically required by statute. There is no present statutory provision requiring notice.

Petitioners finally contend that the Corporation Commission was bound by its own rules of practice [OCCRP Rules 12(e) and 8(d)(7)]. We find this contention of Petitioners to be without merit because the notice published in this case substantially complied with the Corporation Commission's suggested form of notice by publication, even to the point of stating that "after hearing the Commission, regardless of the relief requested in the Application, shall issue such Orders and grant such relief as it deems to be proper, necessary, fair, reasonable and equitable in the premises, whether or not specifically prayed for in the Application." This clearly advised all consumers that the Commission might adjust rates in any manner allowed by law. Petitioners do not contend that restructuring of classes is not an adjustment of rates.

Jurisdiction assumed; Application for Writ of Prohibition denied.

LAVENDER, V.C.J., and DAVISON, WILLIAMS, IRWIN and BERRY, JJ., concur.

HODGES, C.J., and SIMMS and DOOLIN, JJ., dissent.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAR 8 1977
Ross N. Lillard, Jr.
CLERK

CHICKASHA COTTON OIL COMPANY, a corporation, FARMERS UNION CO-OPERATIVE GIN AT MARTHA, HARMON COUNTY COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT DILL CITY, FARMERS UNION COOPERATIVE GIN AT SENTINEL, PLANTERS COOPERATIVE ASSOCIATION, FARMERS UNION COOPERATIVE GIN AT ELK CITY, FLEET-TERRAL GIN COMPANY, COTTON FARMERS COOPERATIVE GIN, FARMERS COOPERATIVE GIN AND LUMBER,

Petitioners,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and THE PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,

Respondents,

v.

LINCOLN PROPERTY CO., RODEWAY INNS, INC. and G.E.M. 15, INC., J. H. FRATES and JOHANNA I. FRATES, TRUSTEES, THE LEWISTON LTD., a limited partnership, and FRATES PROP-

No. 48,956

ERTIES, INC., CRYSTAL BOWL, INC.,)
a corporation, HARVARD LANES, INC.,)
a corporation, ROSE BOWL LANES, INC.,)
a corporation, SAHOMA BOWLING)
LANES, INC., a corporation, SHERIDAN)
LANES, INC., a corporation, TIFFANY)
BOWL, INC., a corporation, YALE BOWL,)
INC., a corporation, and all other)
members of the Oklahoma Bowling Pro-)
prietors Association served by Public)
Service Company of Oklahoma,)
a corporation,)
Intervenors.)

HODGES, C.J., Dissenting:

The sole issue in this case is whether the "Notice" given was adequate and sufficient to apprise the petitioners that a restructuring of rates among the various classes of tariffs in existence was to be considered at the rate hearing before the Corporation Commission. A recitation of the following facts is necessary for a proper understanding of this issue.

On December 3, 1974, The Public Service Company of Oklahoma (PSC) filed an application seeking additional revenue by distribution of a 12.5% rate increase equally among its customers. The application did not mention a proposal to restructure rates. On December 9, 1974, a notice prepared by the Corporation Commission, after rejection of notice prepared by PSC, was issued which provided in pertinent part:

> "Notice Is Hereby Given that the above named Applicant has filed an Application alleging that its earnings from electric utility service in Oklahoma are less than reasonable and asking that the Commission adjust the rates and grant such other relief as to enable the Applicant to earn a fair and adequate rate of return

> on its plant, property, and other assets devoted to public utility service in Oklahoma.
>
> * * * * * *
>
> "It Is Further Ordered that Applicant shall cause the above notice to be published once a week for two consecutive weeks in a newspaper of general circulation in the county seat of all counties in which the Applicant has customers that will be affected by the Application and that notice by mail be given to the Chief Executive Officer of each municipality in which the Applicant furnishes electric retail service, and that such notice, both by mail and by publication, shall be made at Applicant's expense, submitting proof of publication and affidavits of mailing for the record herein.
>
> "It Is Further Ordered that after hearing the Commission, regardless of the relief requested in the Application, shall issue such Orders and grant such relief as it deems to be proper, necessary, fair, reasonable and equitable in the premises, whether or not specifically prayed for in the Application."

The notice was published and PSC mailed flyers to its customers advising them a rate increase was being sought. It also advertised in certain newspapers that "each customer will pay a proportionate share of the increase." Nothing appeared in any of the notices, mailings, or newspaper advertisements alluding to restructuring of PSC's rates. No further notices were given.

Petitioners do not assert that PSC was not entitled to a rate increase, nor that restructuring of rates might not have been appropriate had proper notice been given. They allege that they were denied due process because of the insufficient, inadequate, and misleading notice given by the Corporation Commission. Instead of determining an adjustment in the rates as the notice stated would be done, the Corporation Commission ordered a restructuring of rates

which abrogated various classes of special tariffs without notice to those affected by the change in rate structure.

The Corporation Commission argues that the clause stating it would grant whatever relief necessary rendered the notice inadequate. I do not agree. The notice did not adequately or meaningfully apprise petitioners of the subject matter of the action. Instead it notified them that a hearing would be held on a matter to which they had no objection, i.e., a proportionate increase in rates to be shared equally by all customers.

Notice is a jurisdictional requirement as well as a fundamental requisite of due process. Due process requires adequate notice and a realistic opportunity to appear at a hearing in a meaningful time and in a meaningful manner. The right to be heard is of little value unless adequate notice is given, and due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise interested parties of the pendency of an action.[1]

The failure of due process is amply demonstrated in this case by the fact the Corporation Commission and PSC both knew and realized a "restructuring of rates" was to be an important and integral part of the hearing.

Therefore, in my opinion, the Corporation Commission did not have jurisdiction to enter an order restructuring the rates and the cause should be remanded to the Corporation Commission for further proceedings after issuance of proper notice.

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[1] *Boddie* v. *Connecticut*, 401 U.S. 371, 378, 91 S. Ct. 780, 28 L. Ed. 2d 119 (1971); *Armstrong* v *Manzo*, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965); *Schroeder* v. *New York*, 371 U.S. 208, 211, 83 S. Ct. 279, 9 L. Ed. 2d 252, 89 A.L.R. 2d 1398 (1962); *Riverside & Dan River Cotton Mills* v. *Menefee*, 237 U.S. 189, 35 S. Ct. 579, 59 L. Ed. 910 (1915); *Grannis* v. *Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363, 1369 (1914); *Bomford* v. *Socony Mobil Oil Co.*, 440 P.2d 713, 719 (Okla. 1968); *Simms* v. *Hobbs*, 411 P.2d 503, 510 (Okla. 1966).

However, this Court has a duty to guard against any attempt to upset settled and established rate structures by imposition of new requirements which did not exist before; therefore, I would recognize that all procedural modifications enunciated herein should not be construed as invalidating the notice procedures in any other circumstance other than in the case before us, and that the application of the imposition of proper notice standards and procedures should be prospective only except as to the petitioners herein.[5]

I am authorized to state that Justice Simms and Justice Doolin concur in the views herein expressed.

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[5] See *Bomford* v. *Socony Mobil Oil Co.*, 440 P.2d 713, 721 (Okla. 1968).

APPENDIX E

OKLAHOMA STATUTES
TITLE 17, SECTION 124
Appeal Regarding Refunds

Any party in interest shall have a right to appeal from any action of the commission to determine the amount of refund due, or to whom such refund shall be made, or from any order or judgment rendered by the commission pertaining to the subject-matter set forth in any of the above sections of this act, in the same manner as appeals are now taken from the Corporation Commission to the Supreme Court.

OKLAHOMA STATUTES
TITLE 17, SECTION 155
Orders and Rules of Commission-Scope-Right of Appeal

The Commission may, from time to time, adopt or promulgate, such orders, rules, regulations or requirements, relative to investigations, inspections, tests, audits, and valuations of the plants and properties relative to inspection and tests of meters as in its judgment may be necessary and proper; provided, that under the provisions of this act, any public utility, corporation, association, company, individual, their trustees, lessees or receivers, successors, or assigns, may appeal from any order or finding or judgment of the Corporation Commission as provided by law in cases tried and heard before said Commission of transportation and transmission companies.

OKLAHOMA CORPORATION COMISSION
RULES OF PRACTICE — RULE 26(b)

RELIEF FROM ORDERS:

* * *

(b) At any time subsequent to ten days after entry of an order, an application to vacate, alter, amend or change the order, or for any other form of relief from the order, filed by any party, whether or not a party of record in the original proceeding, shall be treated as a separate proceeding, and shall be governed by rules applicable to the commencement of a proceeding. The application shall (1) identify the order sought to be altered or amended, (2) state specifically the parts or provisions sought to be altered or amended, (3) state specifically the amendments or alterations sought, and (4) state specifically the grounds upon which such relief is sought. Notice of hearing of the application shall be served and published as required upon the commencement of a proceeding; and in addition, the applicant shall attach to his application an affidavit stating that he has served a copy thereof by regular mail on each party of record stated in the order sought to be amended, and prior to hearing the applicant shall file the affidavit referred to in Rule 8(d), where applicable. The application shall be set for hearing before the Commission or hearing officer, as provided in these rules as to the commencement of a proceeding.